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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARILYN HALL PATEL, JUDGE

E.I. DU PONT DE NEMOURS & CO.,)

PLAINTIFF,)

VS.)

NO. C 89-2860 MHP

CETUS CORPORATION, A DELAWARE)
CORPORATION,)

DEFENDANT.)

JURY INSTRUCTIONS

SAN FRANCISCO, CALIFORNIA
THURSDAY, FEBRUARY 21, 1991

APPEARANCES:

FOR PLAINTIFF:

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Dates Entered Q

By: EL

The attorney, whose initials
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and has verified that the
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LEGAL DEPARTMENT
WILMINGTON, DELAWARE 19898

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PLAINTIFF'S EXHIBITS

	<u>IDEN</u>	<u>EVID</u>	<u>VOL.</u>
A-180A		3012	21
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DEFENDANT'S EXHIBITS

	<u>IDEN</u>	<u>EVID</u>	<u>VOL.</u>
B-164		3012	21
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1 THURSDAY, FEBRUARY 21, 1991

9:09 A.M.

2
3 (OPEN COURT, JURY NOT PRESENT:)

4 THE CLERK: THE FOLLOWING EXHIBITS HAVE BEEN ADMITTED
5 INTO EVIDENCE: B-164, B-251, B-252, B-253, B-254, B-255, B-282,
6 A-180A AND A-180B.

7 (PLAINTIFF'S EXHIBITS A-180A &
8 A-180B RECEIVED IN EVIDENCE)
9 (DEFENDANT'S EXHIBITS B-164,
10 B-252 THROUGH B-255 & B-282
11 RECEIVED IN EVIDENCE)

12 THE COURT: GOOD MORNING, COUNSEL.

13 MR. PASAHOW: GOOD MORNING.

14 MR. FIGG: GOOD MORNING, YOUR HONOR.

15 THE COURT: I JUST WANT TO MAKE SURE OF ONE THING
16 BEFORE WE START INSTRUCTING THE JURY:

17 THE LARGE BOOK THAT YOU BROUGHT IN THIS MORNING
18 REFLECTS THE CHANGES, DELETIONS, ET CETERA, IN ALL OF THE
19 INSTRUCTIONS, EXCEPT FOR THE OBVIOUSNESS; IS THAT CORRECT?

20 MR. LEWIS: THAT'S CORRECT, YOUR HONOR.

21 MR. FIGG: THAT'S CORRECT.

22 THE COURT: OKAY. THAT WAS NICE, SINCE I GOT HERE AT
23 7:00 THIS MORNING AND PIECED IT ALL TOGETHER MYSELF.

24 (LAUGHTER)

25 THE COURT: AND YOU MAY HAVE THOUGHT THAT DU PONT

1 ENGAGED IN HARD SERVES, BUT I'M TELLING YOU THAT THEY OVERDID IT
2 ON THE HARD RETURNS, BECAUSE -- ON THE COMPUTER, BECAUSE WHEN WE
3 TRIED TO PRINT OUT SOME OF THE INSTRUCTIONS AFTER MAKING SOME
4 MODIFICATIONS, WE HAD A HORRIBLE TIME, WHICH IS WHY THAT PAGE
5 WAS SORT OF CONFUSED.

6 AND IF YOU TAKE A LOOK AT SOME OF IT, YOU KNOW, YOU'VE
7 GOT A LOT OF HARD RETURNS, SO CONSEQUENTLY THE SPACING WAS ALL
8 OFF.

9 (LAUGHTER)

10 THE COURT: AND SO WE HAD A HORRIBLE TIME. WE WANTED
11 TO TRY TO PRINT IT OUT. IT WAS NOT EASY.

12 SO, ANYWAY, THAT WAS THE REASON FOR THE DELAY; OKAY?

13 MR. FIGG: I THINK IT'S WHEN THE WORD PROCESSING
14 SOFTWARE CONVERTS FROM ONE FORMAT TO THE OTHER.

15 THE COURT: YEAH. I DON'T KNOW WHAT IT WAS. I
16 COULDN'T PRINT IT ON MY MACHINE, AS A MATTER OF FACT; I HAD TO
17 PRINT IT ON ONE OF THE CLERK'S MACHINES.

18 PRINTERS, AS IT'S CALLED THESE DAYS; RIGHT? NOT
19 MACHINES.

20 AND SO, AT ANY RATE, I THINK WE'VE GOT THAT
21 STRAIGHTENED OUT NOW.

22 ANYTHING FURTHER?

23 MR. FIGG: (SHAKING HEAD.)

24 MR. LEWIS: (SHAKING HEAD.)

25 THE COURT: AND YOU'VE AGREED ON THE VERDICT SHEET.

1 MR. LEWIS: YES, YOUR HONOR, I BELIEVE WE DID.

2 THE COURT: AND YOU'RE GOING TO HAVE A FINAL COPY?
3 I'VE GOT A FAX COPY BUT WITH SOME MARKINGS ON IT. DO YOU HAVE A
4 FINAL COPY OF THAT?

5 MR. LEWIS: WE DON'T HAVE ONE TYPED UP.

6 MR. FIGG: THE ONLY ONE WE HAVE IS WITH THE MARKINGS.

7 THE COURT: OKAY. IS SOMEBODY GOING TO PREPARE ONE, OR
8 DO I NEED TO HAVE MY SECRETARY DO THAT?

9 MR. LEWIS: WE CAN GET THAT DONE.

10 THE COURT: IF YOU CAN GET THAT DONE DURING YOUR
11 ARGUMENTS, FINE, OR WHEN MY SECRETARY COMES IN, I'LL HAVE HER DO
12 IT. I THINK THAT'S PROBABLY EASY ENOUGH. BUT IF YOU HAVE
13 SOMEBODY WHO CAN CHURN ONE OUT RIGHT AWAY, THAT WOULD BE
14 HELPFUL.

15 OKAY. FINE. THEN WE'LL GET STARTED WITH THE JURY.

16 THE CLERK: OKAY.

17 (PAUSE IN PROCEEDINGS)

18 MR. FIGG: YOUR HONOR, THERE WAS ONE OTHER ITEM WE
19 NOTICED IN REVIEWING THE EXHIBITS --

20 THE COURT: UH-HUH.

21 MR. FIGG: -- THAT ONE OF THE FILE HISTORIES WAS NOT IN
22 EVIDENCE, AND MR. PASAHOW HAS JUST AGREED TO ITS ADMISSION INTO
23 EVIDENCE. IT'S --

24 THE COURT: WHAT NUMBER IS THAT?

25 MR. FIGG: -- EXHIBIT NUMBER A-79.

1 THE COURT: A-79? OKAY. FINE.

2 MR. FIGG: THANK YOU.

3 (PLAINTIFF'S EXHIBIT A-79

4 RECEIVED IN EVIDENCE)

5 (OPEN COURT, JURY PRESENT:)

6 THE COURT: GOOD MORNING, LADIES AND GENTLEMEN.

7 THE JURORS: GOOD MORNING.

8 THE COURT: SORRY TO KEEP YOU WAITING. IT'S A
9 COMBINATION OF FACTORS.

10 I SUSPECT THAT WE WOULD DO BETTER IF WE WENT BACK TO
11 THE QUILL AGE, BUT WE HAD SOME -- SOME MATERIALS THAT WERE
12 SUBMITTED BY PRINT -- BY COMPUTER AND DISK, AND I SAT DOWN AT
13 THE COMPUTER THIS MORNING AND FOUND OUT THE FORMAT WAS A LITTLE
14 DIFFERENT AND HAD TO PLAY AROUND WITH IT A LITTLE TOO LONG IN
15 ORDER TO GET IT PRINTED OUT.

16 AND SO I APOLOGIZE TO YOU, BUT FROM NOW ON, THE TIME IS
17 GOING TO BE YOURS IN TERMS OF DOING WITH IT AS YOU WILL,
18 BECAUSE, AFTER I GIVE YOU THE INSTRUCTIONS, THE ATTORNEYS WILL
19 MAKE THEIR ARGUMENTS TO YOU AND THEN THE MATTER WILL BE
20 SUBMITTED TO YOU FOR YOUR DELIBERATION.

21 AND YOU MAY WISH TO DECIDE DURING ONE OF THE RECESSES
22 BETWEEN THOSE EVENTS HOW LONG YOU WISH TO STAY TODAY. IF YOU
23 WISH TO KEEP DIFFERENT HOURS THAN YOU'VE BEEN KEEPING, THAT'S
24 FINE, AS LONG AS YOU ALL AGREE TO IT.

25 SO THAT YOU COULD CONTINUE FOR LONGER TODAY, IF YOU

1 WISH, IN DELIBERATIONS OR KEEP THE SAME HOURS YOU'VE BEEN
2 KEEPING HERETOFORE, INCLUDING COMING IN ON FRIDAY AS WELL. SO I
3 WILL LEAVE THAT UP TO YOU.
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(CONTINUED ON NEXT PAGE, NOTHING OMITTED)

1 THE COURT: NOW, THIS IS PROBABLY THE LEAST
2 SCINTILLATING PART OF THE TRIAL, I WILL BE THE FIRST TO ADMIT,
3 BECAUSE IT'S THE PORTION OF THE TRIAL WHERE I TELL YOU WHAT THE
4 LAW IS THAT APPLIES, AND IT'S -- IT'S RATHER CUT AND DRIED
5 AND -- BUT YET IT'S VERY IMPORTANT.

6 ALSO, THE INSTRUCTIONS THAT YOU WILL BE GIVEN WILL BE
7 GIVEN TO YOU IN WRITING, SO THAT YOU DO NOT HAVE TO -- AND I
8 THINK WOULD NOT BE A WISE USE OF YOUR TIME OR EFFORT TO TRY TO
9 TAKE NOTES ON IT, BECAUSE I THINK IT WOULD MAKE MORE SENSE IF
10 YOU JUST LISTEN TO IT AND TRY TO MAKE SENSE OF IT AS A WHOLE,
11 AND THEN IF YOU HAVE ANY QUESTIONS ABOUT A PARTICULAR
12 INSTRUCTION, YOU WILL HAVE THEM IN WRITING AND YOU CAN THEN
13 FOCUS IN ON THOSE PARTICULAR INSTRUCTIONS.

14 THE INSTRUCTIONS ARE ESSENTIALLY DIVIDED INTO THREE
15 PARTS, PERHAPS FOUR ACTUALLY: ONE HAVING TO DO WITH YOUR DUTIES
16 AS JURORS;

17 ANOTHER HAVING TO DO WITH THE EVIDENCE AND WHAT IS
18 EVIDENCE, AND WEIGHING THE TESTIMONY OF WITNESSES AND HOW TO
19 TREAT PARTICULAR TYPES OF TESTIMONY OR EXPERT WITNESSES;

20 AND THEN WHAT I'M SURE IS GOING TO BE MOST CRITICAL TO
21 YOU, AND THAT IS WHAT MUST BE PROVED IN THIS CASE IN TERMS OF
22 THE BURDEN OF PROOF AND WHAT THE LAW IS THAT APPLIES TO EACH OF
23 THE CONTENTIONS HERE OF INVALIDITY, NAMELY, ANTICIPATION AND
24 OBVIOUSNESS AND WHAT ALL OF THAT MEANS, AND THOSE ARE FAIRLY
25 LENGTHY INSTRUCTIONS;

2
1 AND THEN, FINALLY, THERE ARE SOME CONCLUDING
2 INSTRUCTIONS WHICH I WILL GIVE YOU AFTER THE ATTORNEYS HAVE
3 ARGUED TO YOU, AND THOSE HAVE TO DO WITH YOUR DUTIES ABOUT
4 DELIBERATION AND HOW YOU PROCEED.

5 YOU WILL RECALL THAT, AT THE OUTSET OF THIS CASE, YOU
6 WERE SWORN AS JURORS, AND I TOLD YOU THAT, IN FACT, YOU'RE
7 JUDGES, BECAUSE YOU ARE JUDGES OF THE FACTS. AND YOU HAVE TO
8 DECIDE FROM THE FACTS, THE EVIDENCE THAT YOU'VE HEARD IN THIS
9 CASE, WHAT YOU BELIEVE TO BE THE TRUE FACTS AND APPLY THE LAW TO
10 IT AND IN THAT MANNER ARRIVE AT YOUR VERDICT.

11 YOU MUST FOLLOW THE LAW AS I GIVE IT TO YOU, WHETHER
12 YOU AGREE WITH IT OR NOT.

13 AND YOU MUST NOT BE INFLUENCED BY ANY PERSONAL LIKES OR
14 DISLIKES, OPINIONS, PREJUDICES, OR SYMPATHY. THAT MEANS THAT
15 YOU MUST DECIDE THE CASE SOLELY ON THE EVIDENCE BEFORE YOU AND
16 ACCORDING TO THE LAW. AND YOU'LL RECALL THAT YOU TOOK AN OATH
17 TO DO JUST THAT AT THE OUTSET OF THE PROCEEDINGS.

18 IN FOLLOWING THESE INSTRUCTIONS, YOU MUST FOLLOW ALL OF
19 THEM AND NOT SINGLE OUT ANY ONE PARTICULAR ONE AND IGNORE
20 OTHERS.

21 NOW, OBVIOUSLY, SOME OF THEM APPLY TO SOME CLAIMS
22 AND -- OR, RATHER, TO CLAIMS OF THE -- OF INVALIDITY,
23 ANTICIPATION OR OBVIOUSNESS, AND SOME -- AND SOME DO NOT. BUT
24 IN OTHER RESPECTS, THEY ARE ALL IMPORTANT AND YOU MUST NOT READ
25 ANYTHING INTO THESE INSTRUCTIONS TO INDICATE WHAT I THINK YOU

2
1 SHOULD FIND, NOR SHOULD YOU READ INTO ANYTHING THAT I'VE SAID OR
2 DONE WHAT I THINK YOU SHOULD FIND. THE VERDICT MUST BE YOURS,
3 BUT IT MUST BE BASED UPON THE LAW AS GIVEN TO YOU IN THESE
4 INSTRUCTIONS.

5 NOW, YOUR VERDICT, AS I SAID, MUST BE BASED UPON THE
6 EVIDENCE, AND THE EVIDENCE IN THE CASE COMES FROM THE TESTIMONY
7 OF THE WITNESSES -- AND THAT'S THE TESTIMONY THAT HAS BEEN
8 ADMITTED INTO EVIDENCE -- WHETHER IT WAS BY VIRTUE OF DIRECT
9 EXAMINATION OR CROSS-EXAMINATION, REGARDLESS OF WHO CALLED THE
10 WITNESSES.

11 THE TESTIMONY -- OR THE EVIDENCE CONSISTS ALSO OF THE
12 DOCUMENTS, AND THE EXHIBITS THAT WERE ADMITTED INTO EVIDENCE,
13 AND ANY FACTS TO WHICH THE LAWYERS HAVE STIPULATED. AND YOU
14 WILL RECALL DURING THE COURSE OF THE TRIAL THERE WERE SOME
15 STIPULATIONS THAT WERE ENTERED INTO. SOME OF THOSE WERE
16 ACTUALLY ENTERED INTO EVIDENCE AND ARE EXHIBITS. AND THOSE ARE,
17 OF COURSE, DEEMED TO BE FACTS, AND YOU ARE NOT TO MAKE ANY
18 ADDITIONAL FINDING WITH RESPECT TO THE FACT THAT IS AGREED TO BY
19 THE LAWYERS IN THE STIPULATION.

20 THERE ARE MANY THINGS THAT OCCUR DURING THE COURSE OF
21 THE TRIAL THAT ARE NOT EVIDENCE. AGAIN, I TOLD YOU AT THE
22 OUTSET OF THE TRIAL THAT THOSE THINGS ARE IMPORTANT, BUT THEY'RE
23 IMPORTANT FOR DIFFERENT REASONS AND NOT FOR EVIDENTIARY REASONS.

24 THE ARGUMENTS AND THE STATEMENTS BY THE LAWYERS ARE NOT
25 EVIDENCE, BECAUSE THEY ARE NOT WITNESSES. WHAT THEY HAVE SAID

2 1 DURING THE COURSE OF THEIR TRIAL -- DURING THE COURSE OF THE
2 TRIAL MAY BE FOR THE PURPOSE OF ELICITING TESTIMONY FROM THE
3 WITNESS, BUT IT IS THE WITNESS' ANSWER THAT IS THE TESTIMONY,
4 AND THE QUESTIONS ARE ONLY TO BE CONSIDERED BY YOU IN THAT
5 RESPECT AS THEY SUPPLY MEANING TO THE ANSWER.

6 THE OPENING STATEMENTS HAD THE PURPOSE OF GIVING YOU AN
7 OVERVIEW OF THE CASE.

8 THE ARGUMENTS ARE THE ATTORNEYS' ADVOCACY POSITIONS,
9 THEIR OBLIGATION TO -- TO ARGUE TO YOU THE FACTS IN THE LIGHT
10 THAT'S MOST FAVORABLE TO THEIR CLIENTS. AND THAT'S IMPORTANT.
11 SOMETIMES, AFTER ALL OF -- OF THE WEEKS OF LISTENING TO THE
12 EVIDENCE, YOU BEGIN TO GET A FIX ON THE CASE AND A SET WAY OF
13 LOOKING AT -- AT THE FACTS, AND THE ATTORNEYS WILL HELP YOU TO
14 SEE IT -- OR SEE THE FACTS IN PERHAPS A DIFFERENT LIGHT.

15 AND IT'S VERY MUCH LIKE LOOKING AT THINGS THROUGH
16 DIFFERENT KINDS OF PRISMS OR DIFFERENT PARTS OF A PRISM, AND YOU
17 WILL SEE THINGS JUST A LITTLE BIT DIFFERENTLY.

18 AND THAT'S EXACTLY WHAT THE LAWYER'S JOB IS, TO HELP
19 YOU SEE THOSE FACTS IN THE LIGHT THAT'S MOST FAVORABLE TO THEIR
20 CLIENT, BUT ALSO IN A DIFFERENT LIGHT, AND TO TRY TO PERSUADE
21 YOU IN THAT RESPECT.

22 BUT KEEP IN MIND THAT IF THE LAWYERS STATE SOMETHING IN
23 THEIR ARGUMENTS THAT YOU BELIEVE IS NOT A CORRECT STATEMENT OF
24 THE FACTS THAT YOU HEARD, IT'S UP TO YOU TO RELY UPON THE
25 STATEMENT OF FACTS THAT YOU HEARD IN THE TESTIMONY OF THE

3
1 WITNESSES AND NOT UPON THE STATEMENTS OF THE LAWYERS IN THAT
2 RESPECT.

3 AND, OF COURSE, YOU MUST NOT CONSIDER ANY TESTIMONY
4 THAT'S BEEN EXCLUDED. IF ANY TESTIMONY WAS STRICKEN, YOU ARE
5 INSTRUCTED TO DISREGARD IT, OR IF IT WAS STRICKEN AND I
6 NEGLECTED TO TELL YOU TO DISREGARD IT, YOU RECALL FROM THE
7 OUTSET I SAID THAT YOU MUST DISREGARD ANY STRICKEN TESTIMONY.
8 THAT IS NOT EVIDENCE.

9 ALSO, OF COURSE, ANYTHING SEEN OR DONE OUTSIDE THE
10 COURTROOM IS NOT EVIDENCE, AND YOU MUST ALL DECIDE THE CASE
11 BASED UPON THE SAME EVIDENCE AND THAT MEANS THE EVIDENCE THAT
12 WAS ADMITTED IN THIS TRIAL.

13 THERE ARE TWO KINDS OF EVIDENCE: DIRECT AND
14 CIRCUMSTANTIAL.

15 DIRECT EVIDENCE IS DIRECT PROOF OF A FACT, SUCH AS
16 SOMETHING THAT A WITNESS HAS -- HAS HIMSELF OR HERSELF SEEN
17 OR . . . OR DONE OR HEARD; IN OTHER WORDS, THE TESTIMONY OF AN
18 EYEWITNESS.

19 CIRCUMSTANTIAL EVIDENCE IS INDIRECT EVIDENCE; THAT IS,
20 PROOF OF A CHAIN OF FACTS FROM WHICH YOU COULD FIND THAT ANOTHER
21 FACT EXISTS, EVEN THOUGH IT HAS NOT BEEN PROVED DIRECTLY.

22 YOU'RE ENTITLED TO CONSIDER BOTH KINDS OF EVIDENCE.
23 THE LAW PERMITS YOU TO GIVE EQUAL WEIGHT TO BOTH, BUT IT IS FOR
24 YOU TO DECIDE HOW MUCH WEIGHT TO GIVE TO ANY EVIDENCE, AND IT IS
25 FOR YOU TO DECIDE WHETHER A FACT HAS BEEN PROVED BY

3 1 CIRCUMSTANTIAL EVIDENCE.

2 IN MAKING THAT DECISION, YOU MUST CONSIDER ALL OF THE
3 EVIDENCE IN LIGHT OF THE REASON, COMMON SENSE AND EXPERIENCE
4 THAT YOU BRING TO THIS CASE.

5 IN DECIDING THE FACTS AND WHAT FACTS YOU WILL BELIEVE,
6 YOU MUST CONSIDER AND WEIGH THE TESTIMONY OF WITNESSES.

7 YOU MAY DISBELIEVE ALL OR ANY PART OF A WITNESS'
8 TESTIMONY. IN MAKING THAT DECISION, YOU MAY TAKE INTO ACCOUNT A
9 NUMBER OF FACTORS, INCLUDING THE FOLLOWING:

10 WAS THE WITNESS ABLE TO SEE OR HEAR OR KNOW THE THINGS
11 ABOUT WHICH THE WITNESS TESTIFIED?

12 HOW WELL WAS THE WITNESS ABLE TO RECALL AND DESCRIBE
13 THOSE THINGS?

14 WHAT WAS THE WITNESS' MANNER WHILE TESTIFYING?

15 DID THE WITNESS HAVE AN INTEREST IN THE OUTCOME OF THE
16 CASE OR ANY BIAS OR PREJUDICE CONCERNING ANY PARTY OR ANY MATTER
17 INVOLVED IN THE CASE?

18 HOW REASONABLE WAS THE WITNESS' TESTIMONY CONSIDERED IN
19 LIGHT OF ALL OF THE EVIDENCE IN THE CASE?

20 WAS THE WITNESS' TESTIMONY CONTRADICTED BY SOMETHING
21 THAT THAT WITNESS HAS SAID OR DONE AT SOME OTHER TIME, OR BY THE
22 TESTIMONY OF OTHER WITNESSES, OR BY OTHER EVIDENCE?

23 IN DECIDING WHETHER OR NOT TO BELIEVE A WITNESS, KEEP
24 IN MIND THAT PEOPLE SOMETIMES FORGET THINGS. YOU NEED TO
25 CONSIDER WHETHER A CONTRADICTION IS AN INNOCENT LAPSE OF MEMORY

3
1 OR AN INTENTIONAL FALSEHOOD, AND THAT MAY DEPEND UPON WHETHER IT
2 IS AN IMPORTANT FACT OR WHETHER ONLY A TRIVIAL DETAIL.

3 THESE ARE SOME OF THE FACTORS THAT YOU MAY CONSIDER IN
4 DECIDING WHETHER TO BELIEVE TESTIMONY.

5 THE WEIGHT OF THE EVIDENCE PRESENTED BY EACH SIDE DOES
6 NOT NECESSARILY DEPEND ON THE NUMBER OF WITNESSES TESTIFYING ON
7 EACH SIDE. ONE MUST CONSIDER ALL OF THE EVIDENCE IN THE CASE,
8 AND YOU MAY DECIDE THAT THE TESTIMONY OF A SMALLER NUMBER OF
9 WITNESSES ON ONE SIDE HAS GREATER WEIGHT THAN THAT OF A LARGER
10 NUMBER ON THE OTHER. THE TEST IS WHICH WITNESS OR WITNESSES AND
11 WHICH EVIDENCE APPEALS TO YOUR MINDS AS BEING THE MOST ACCURATE
12 AND OTHERWISE TRUSTWORTHY AND NOT WHICH SIDE BRINGS THE GREATER
13 NUMBER OF WITNESSES OR PRESENTS THE GREATER QUANTITY OF
14 EVIDENCE.

15 ALL OF THESE MATTERS ARE FOR YOU TO CONSIDER IN
16 WEIGHING AND EVALUATING THE TESTIMONY OF WITNESSES.

17 IN THIS CASE, WE ALSO HAD A GREAT DEAL OF EXPERT
18 TESTIMONY, AND THERE ARE PARTICULAR INSTRUCTIONS THAT APPLY TO
19 EXPERT TESTIMONY.

20 THERE WERE SOME PERSONS WHO, BY VIRTUE OF THEIR
21 EXPERIENCE, BACKGROUND AND TRAINING INDEED TESTIFIED
22 PREDOMINANTLY AS EXPERT WITNESSES AND DID NOT HAVE ANY PERSONAL
23 KNOWLEDGE OF THE FACTS IN THIS CASE OTHER THAN WHAT THEY LEARNED
24 AS THEY WERE PREPARING TO BE EXPERTS IN THIS CASE.

25 THERE WERE OTHERS WHO OBVIOUSLY HAVE EXPERTISE IN THE

3
1 FIELD BUT ALSO ARE WITNESSES TO THE EVENTS THAT HAVE OCCURRED
2 THAT ARE -- THAT ARE PERTINENT TO THIS CASE.

3 WHEN SOMEONE IS QUALIFIED TO TESTIFY OR IS ALLOWED TO
4 TESTIFY AS AN EXPERT, YOU MAY CONSIDER THEIR TESTIMONY. IT IS
5 ENTITLED TO BE CONSIDERED BASED UPON THEIR EXPERIENCE, TRAINING,
6 BACKGROUND BECAUSE THEY'VE BECOME EXPERT IN SOME FIELD BY REASON
7 OF THEIR TRAINING, EXPERIENCE OR BACKGROUND, AND THEREFORE
8 THEY'RE ALLOWED TO STATE THEIR OPINIONS ON MATTERS THAT -- IN
9 THAT FIELD, AND THEY MAY ALSO STATE THE REASONS FOR THOSE
10 OPINIONS.

11 THAT TESTIMONY SHOULD BE TREATED AND EXAMINED JUST AS
12 ANY OTHER TESTIMONY. YOU MAY ACCEPT IT OR REJECT IT, GIVE IT AS
13 MUCH WEIGHT AS YOU THINK IT DESERVES, CONSIDERING THE WITNESS'
14 EDUCATION AND EXPERIENCE, THE REASONS GIVEN FOR THE OPINION AND
15 ALL OF THE OTHER EVIDENCE IN THE CASE.

16 ALSO IN THIS CASE, TESTIMONY MAY HAVE BEEN ALLOWED IN
17 FOR A LIMITED PURPOSE, AND IF THAT WAS THE CASE, YOU WERE SO
18 TOLD AND YOU MAY CONSIDER IT ONLY FOR THAT PURPOSE.

19 THERE IS A SPECIFIC EXAMPLE WHICH I'M GOING TO CITE TO
20 YOU AND THAT GIVES YOU SOME SUGGESTION OF WHAT WE MEAN BY
21 LIMITED PURPOSE TESTIMONY.

22 YOU RECALL THAT DR. RUTH KLEPPE TESTIFIED. HER
23 TESTIMONY WAS ABOUT WHAT SHE HEARD IN SEMINARS IN DR. KHORANA'S
24 LAB, OR SOME OF HER TESTIMONY WAS ABOUT THAT, AND HER NOTES FROM
25 THE GROUP MEETINGS THAT WERE ADMITTED INTO EVIDENCE BUT ONLY FOR

4
1 A LIMITED PURPOSE, AND YOU MAY CONSIDER THAT EVIDENCE ONLY FOR
2 THE LIMITED PURPOSE FOR WHICH IT WAS ADMITTED.

3 YOU MAY CONSIDER IT ONLY FOR THE PURPOSE OF DECIDING
4 WHAT WAS SAID AND HEARD DURING THE GROUP MEETINGS AND,
5 THEREFORE, WHAT WAS COMMUNICATED TO THOSE IN ATTENDANCE.

6 YOU MUST NOT CONSIDER IT FOR THE PURPOSE OF DECIDING
7 THE ACCURACY OR INACCURACY OF WHAT WAS ACTUALLY SAID, OR FOR THE
8 PURPOSE OF DECIDING WHAT WORK WAS ACTUALLY PERFORMED IN THE
9 KHORANA LABORATORY, UNLESS DR. KLEPPE HERSELF COULD SO TESTIFY
10 BASED UPON HER OWN OBSERVATIONS.

11 REMEMBER, THAT IS BECAUSE TESTIMONY AS TO WHAT SOMEONE
12 ELSE HAS SAID OCCURRED IS HEARSAY AND THEREFORE NOT PROPER
13 EVIDENCE.

14 YOU RECALL THAT THERE WERE OTHER TIMES WHERE YOU WERE
15 TOLD THAT THE EVIDENCE DOES NOT COME IN FOR THE TRUTH OF THE
16 STATEMENT CONTAINED IN THE STATEMENT BUT, RATHER, TO EXPLAIN WHY
17 SOMEONE DID WHAT THEY DID, OR WHETHER THEY WERE ON NOTICE OR HAD
18 INFORMATION THAT THEY HAVE TESTIFIED ABOUT.

19 YOU'VE ALSO HEARD IN THIS CASE A GREAT DEAL ABOUT
20 PROFESSOR KHORANA, AND YOU MAY WONDER TO YOURSELVES: WHY IS
21 PROFESSOR KHORANA NOT HERE?

22 WELL, PROFESSOR KHORANA IS NOT A PARTY TO THIS
23 LITIGATION, HE'S NOT EMPLOYED BY EITHER OF THE PARTIES TO THIS
24 LITIGATION, AND HIS TESTIMONY COULD NOT BE OBTAINED IN THIS
25 TRIAL. SO YOU'RE NOT TO SPECULATE IN ANY WAY AS TO WHAT HIS

4
1 ABSENCE FROM THE TRIAL MIGHT MEAN; THAT IS, HIS UNAVAILABILITY
2 DOES NOT LEND CREDENCE TO EITHER PARTY'S POSITION AND YOU ARE
3 NOT TO CONSIDER HIS ABSENCE AS EVIDENCE FOR EITHER SIDE IN THE
4 CASE.

5 SO WHILE YOU MAY WONDER, YOU HAVE TO PUT THAT WONDER
6 ASIDE AND NOT CONSIDER AT ALL THE REASONS FOR HIS NOT BEING
7 AVAILABLE TO TESTIFY OR NOT TESTIFYING OR SPECULATE AS TO WHAT
8 THAT TESTIMONY MIGHT HAVE BEEN. IT WOULD BE ENTIRELY IMPROPER
9 FOR YOU TO DO THAT.

10 THERE WAS ALSO SOME TESTIMONY EARLY IN THE TRIAL
11 REGARDING THE FUNCTIONING OF THE PATENT OFFICE AND THE PEOPLE
12 WHO ARE EMPLOYED AS PATENT EXAMINERS IN THE PATENT OFFICE, AND
13 SPECIFICALLY THERE WAS SOME BRIEF TESTIMONY REGARDING DR. JAMES
14 MARTINELL, WHO WAS THE PATENT EXAMINER WHO DID THE
15 EXAMINATION -- RE-EXAMINATION IN THIS CASE.

16 YOU ARE ADVISED THE FOLLOWING WITH RESPECT TO HIS
17 BACKGROUND AND EXPERIENCE, AND THE PARTIES, I THINK, AGREE THAT
18 ESSENTIALLY THERE'S NO DISPUTE AS TO THE EDUCATIONAL BACKGROUND
19 AND EXPERIENCE OF DR. MARTINELL, AND I MERELY GIVE THIS TO YOU
20 SO IT MAY ASSIST YOU IN EVALUATING THE TESTIMONY IN THE CASE.
21 IT IS NOT A CERTIFICATION OF HIM OR A GOOD HOUSEKEEPING SEAL OF
22 APPROVAL. IT MERELY IS TO INFORM YOU AS TO DR. MARTINELL'S
23 BACKGROUND, TRAINING AND EXPERIENCE.

24 HE RECEIVED A PH.D. IN MOLECULAR BIOLOGY FROM WESLEYAN
25 UNIVERSITY IN 1978.

4
1 HE WAS A RUNYON-WINCHELL CANCER FUND POST-DOCTORAL
2 FELLOW IN 1978 TO '79 AND A STAFF FELLOW IN 1979 TO 1981 IN THE
3 LABORATORY OF DR. W. FRENCH ANDERSON IN THE MOLECULAR HEMATOLOGY
4 BRANCH OF THE NATIONAL HEART, LUNG AND BLOOD INSTITUTE OF THE
5 NATIONAL INSTITUTES OF HEALTH IN BETHESDA, MARYLAND.

6 DURING THAT TIME, HE CONDUCTED RESEARCH CONCERNING THE
7 MOLECULAR BIOLOGY OF THALASSEMIC MICE USING RECOMBINANT DNA AND
8 MOLECULAR CLONING TECHNIQUES.

9 DR. MARTINELL JOINED THE PATENT OFFICE AS AN EXAMINER
10 IN JUNE 1981. HE HAD BECOME A PRIMARY EXAMINER BY THE TIME THE
11 '202 AND '195 PATENTS ISSUED IN JULY '87.

12 PRIOR TO JOINING THE PATENT OFFICE, DR. MARTINELL HAD
13 CO-AUTHORED FIVE PUBLICATIONS IN THE FIELD OF MOLECULAR BIOLOGY.

14 ALSO, DURING THE COURSE OF THE TRIAL, DEPOSITIONS WERE
15 USED. SOMETIMES THEY WERE USED IN THE COURSE OF EXAMINING A
16 WITNESS TO QUESTION THAT WITNESS ABOUT WHAT THAT WITNESS HAD
17 TESTIFIED TO PRIOR TO TRIAL. IN OTHER CASES, THE DEPOSITION WAS
18 READ -- ENTIRE DEPOSITION OR PORTIONS OF IT WERE READ INTO THE
19 RECORD.

20 A DEPOSITION IS A -- IS JUST LIKE TESTIMONY TAKEN IN A
21 COURT. IT'S TAKEN UNDER OATH WITH A COURT REPORTER PRESENT
22 REPORTING IT, AND WITH COUNSEL FOR ALL PARTIES PRESENT WITH AN
23 OPPORTUNITY TO OBJECT, JUST AS THEY DO IN COURT, AND AN
24 OPPORTUNITY TO EXAMINE THE WITNESS.

25 IT IS A RECORDED AND SWORN STATEMENT OF QUESTIONS AND

4
1 ANSWERS OF THAT WITNESS WHO, FOR SOME REASON, CANNOT BE PRESENT
2 TO TESTIFY FROM THE WITNESS STAND. AND THAT MAY BE PRESENTED
3 EITHER BY ORAL TESTIMONY, AS WE HAD IN THIS CASE, OR IN SOME
4 OTHER FASHION, SUCH AS VIDEO TESTIMONY.

5
6 SUCH TESTIMONY IS ENTITLED TO THE SAME CONSIDERATION
7 AND IT'S TO BE JUDGED AS TO CREDIBILITY AND WEIGHED AND
8 OTHERWISE CONSIDERED BY THE -- BY YOU, INSOFAR AS POSSIBLE, IN
9 THE SAME WAY AS IF THE WITNESS HAD BEEN PRESENT AND HAD
10 TESTIFIED FROM THE STAND.

11
12 ALSO IN THIS CASE CERTAIN CHARTS AND SUMMARIES HAVE
13 BEEN SHOWN TO YOU IN ORDER TO HELP EXPLAIN THE FACTS DISCLOSED
14 BY THE BOOKS, RECORDS AND OTHER DOCUMENTS WHICH ARE IN EVIDENCE
15 IN THE CASE.

16
17 SUCH CHARTS AND SUMMARIES ARE USED FOR YOUR
18 CONVENIENCE. THEY ARE NOT THEMSELVES EVIDENCE OR PROOF OF ANY
19 FACTS. IF THEY DO NOT CORRECTLY REFLECT THE FACTS OR FIGURES OR
20 MATERIALS SHOWN BY THE EVIDENCE IN THE CASE, YOU SHOULD
21 DISREGARD THE CHARTS AND SUMMARIES AND DETERMINE THE FACTS FROM
22 THE UNDERLYING EVIDENCE.

23
24 NOW, WITH RESPECT TO THE CLAIMS THEMSELVES IN THIS
25 CASE, AS YOU WERE TOLD AT THE BEGINNING OF THE CASE, PLAINTIFF
DU PONT HAS ALLEGED THAT TWO PATENTS, REFERRED TO AS THE '202
AND THE '195 PATENTS, ARE INVALID. CETUS CLAIMS THAT THE
PATENTS ARE VALID.

WITH RESPECT TO ANY CLAIM OF THE '202 PATENT THAT

5 1 DU PONT CONTENTS IS INVALID, DU PONT MUST PROVE AT LEAST ONE OF
2 THE FOLLOWING ELEMENTS:

3 1. THAT THE PROCESS OF THE CHALLENGED PATENT OR
4 CLAIM -- CLAIM IN THE PATENT, I SHOULD SAY, IS NOT NOVEL OR NEW
5 BECAUSE IT WAS KNOWN OR USED BY OTHERS IN THIS COUNTRY BEFORE IT
6 WAS ALLEGEDLY INVENTED BY THE APPLICANT OF THE '202 PATENT, DR.
7 MULLIS;

8 2. THAT THE PROCESS OF THE CHALLENGED CLAIM IS NOT
9 NOVEL OR NEW BECAUSE IT WAS DESCRIBED IN A PRINTED PUBLICATION
10 MORE THAN ONE YEAR BEFORE THE FILING OF THE DATE OF THE
11 APPLICATION FOR THE '202 PATENT;

12 3. THAT THE PROCESS OF THE CHALLENGED CLAIM IS NOT
13 NOVEL OR NEW BECAUSE IT WAS MADE IN THIS COUNTRY BEFORE ITS
14 ALLEGED INVENTION BY DR. MULLIS BY ANOTHER WHO DID NOT ABANDON,
15 SUPPRESS OR CONCEAL THE PROCESS; THAT IS, THE PRIOR INVENTOR
16 TOOK NO STEPS TO KEEP THE PROCESS SECRET AND TOOK STEPS TO
17 REVEAL THE INVENTION TO THE PUBLIC WHO MAY HAVE BENEFITED FROM
18 THE INVENTION;

19 4. THAT THE DIFFERENCE BETWEEN THE PROCESS OF THE
20 CHALLENGED CLAIM AND THE PRIOR ART ARE SUCH THAT THE CHALLENGED
21 PROCESS AS A WHOLE WOULD HAVE BEEN OBVIOUS AT THE TIME OF ITS
22 ALLEGED INVENTION TO A PERSON HAVING ORDINARY SKILL IN THE
23 PERTINENT ART.

24 WITH RESPECT TO ANY CLAIM OF THE '195 PATENT THAT
25 PLAINTIFF DU PONT CONTENTS IS INVALID, DU PONT MUST PROVE THAT

5 1 THE DIFFERENCES BETWEEN THE PROCESS OF THE CHALLENGED CLAIM AND
2 THE PRIOR ART ARE SUCH THAT THE CLAIMED PROCESS AS A WHOLE WOULD
3 HAVE BEEN OBVIOUS AT THE TIME OF THE ALLEGED INVENTION TO A
4 PERSON HAVING ORDINARY SKILL IN THE PERTINENT ART.

5 THE UNITED STATES CONSTITUTION PROVIDES FOR THE
6 PROTECTION OF INVENTIONS THROUGH THE GRANT OF PATENTS. THE
7 PURPOSE OF THE PATENT SYSTEM IS TO PROMOTE PROGRESS IN SCIENCE
8 BY ENCOURAGING INVENTORS TO MAKE NEW INVENTIONS AND TO DISCLOSE
9 THEM TO THE PUBLIC.

10 THE PATENT SYSTEM DOES THIS BY GUARANTEEING TO
11 INVENTORS THE RIGHT FOR A PERIOD OF 17 YEARS TO EXCLUDE OTHERS
12 FROM MAKING, USING AND SELLING THEIR DISCOVERIES AND INVENTIONS.

13 IN EXCHANGE FOR THIS RIGHT, AN INVENTOR IS SUPPOSED TO
14 DISCLOSE TO THE PUBLIC SOMETHING IT NEVER HAD BEFORE.

15 CONSEQUENTLY, THE PATENT THAT HAS BEEN GRANTED FOR A DEVICE OR
16 PROCESS THAT IS NOT NEW AND HAS LONG BEEN IN THE PUBLIC DOMAIN
17 IS INVALID. THE LAW WILL NOT ALLOW AN ALLEGED INVENTOR TO USE
18 THE PATENT SYSTEM IN ORDER TO TAKE BACK FROM THE PUBLIC
19 DISCOVERIES THAT ARE ALREADY IN THE POSSESSION OF THE PUBLIC.

20 IN THIS CIVIL CASE, DU PONT HAS THE BURDEN OF PROVING
21 THE CASE BY WHAT IS CALLED CLEAR AND CONVINCING EVIDENCE.

22 AGAIN, REMINDING YOU FROM THE TIME THAT WE VOIR DIRE
23 YOU AND TALKED WITH YOU AT THE OUTSET, SOME CIVIL CASES HAVE A
24 BURDEN OF WHAT IS CALLED A PREPONDERANCE OF THE EVIDENCE. THAT
25 IS DIFFERENT. IT IS A LESSER STANDARD THAN WHAT IS INVOLVED

5
1 HERE.

2 IN CRIMINAL CASES, THERE IS A BURDEN CALLED BEYOND A
3 REASONABLE DOUBT, AND THAT IS A HIGHER STANDARD THAN WHAT IS
4 INVOLVED HERE.

5 CLEAR AND CONVINCING EVIDENCE IS A STANDARD THAT IS NOT
6 SOMETHING HALFWAY IN BETWEEN. IT HAS TO BE DETERMINED BASED
7 UPON THE INSTRUCTIONS I'M GOING TO GIVE TO YOU, AND IT -- THESE
8 INSTRUCTIONS DEFINE WHAT IS MEANT BY "CLEAR AND CONVINCING
9 EVIDENCE."

10 THAT MEANS THAT DU PONT HAS TO PRODUCE EVIDENCE WHICH
11 IS HIGHLY PROBABLE AND FREE FROM SERIOUS DOUBT.

12 TO PUT IT DIFFERENTLY, CLEAR AND CONVINCING EVIDENCE
13 MUST PRODUCE IN YOUR MINDS A FIRM BELIEF OR CONVICTION AS TO THE
14 MATTERS SOUGHT TO BE ESTABLISHED.

15 YOU MUST BE CONVINCED THAT THE FACT IS INDEED TRUE IN
16 ORDER TO MEET THE CLEAR AND CONVINCING STANDARD. IF DU PONT
17 FAILS TO MEET THIS BURDEN, THE VERDICT MUST BE FOR CETUS.
18 HOWEVER, IF YOU HAVE A FIRM BELIEF THAT ANY CLAIM AT ISSUE IN
19 THE SUIT IS INVALID, THEN THE VERDICT WITH RESPECT TO THAT CLAIM
20 MUST BE FOR DU PONT.

21 THOSE OF YOU WHO HAVE SAT ON CRIMINAL CASES RECALL THE
22 BURDEN OF REASONABLE DOUBT, AND PLEASE KEEP IN MIND THAT THAT
23 DOES NOT APPLY -- THAT IS NOT DEFINED THE SAME AS THIS STANDARD
24 IS DEFINED, AND IF YOU HAVE A PROBLEM IN ARTICULATING THAT TO
25 YOURSELF OR THINKING ABOUT WHAT IT MEANS, YOU MAY GO BACK AND

6 1 LOOK AT THAT PARTICULAR INSTRUCTION AND READ IT AGAIN DURING
2 YOUR DELIBERATIONS.

3 A PARTY'S BURDEN REMAINS THE SAME THROUGHOUT THE CASE;
4 THAT IS, IT NEVER CHANGES.

5 WITH RESPECT TO THE PATENTS AND HOW YOU ARE TO REGARD
6 THOSE IN THIS CASE WITH RESPECT TO WHAT IS CALLED THE
7 PRESUMPTION OF VALIDITY, THE FOLLOWING INSTRUCTIONS APPLY:

8 THE GRANTING OF A PATENT BY THE UNITED STATES PATENT &
9 TRADEMARK OFFICE CARRIES WITH IT THE REPRESENTATION THAT THE
10 PATENT IS VALID.

11 FROM ISSUANCE OF THE PATENT, IT IS PRESUMED THAT ITS
12 SUBJECT MATTER IS NEW, USEFUL AND CONSTITUTES AN ADVANCE WHICH
13 WAS NOT, AT THE TIME THE INVENTION WAS MADE, OBVIOUS TO ONE OF
14 ORDINARY SKILL IN THE ART.

15 THE LAW PRESUMES, IN THE ABSENCE OF CLEAR AND
16 CONVINCING EVIDENCE TO THE CONTRARY, THAT THE PATENT & TRADEMARK
17 OFFICE ACTED CORRECTLY IN ISSUING THE PATENT.

18 THIS PRESUMPTION OF VALIDITY PUTS THE BURDEN OF PROVING
19 INVALIDITY ON THE PLAINTIFF DU PONT. THIS BURDEN REQUIRES THAT
20 DU PONT PROVE BY CLEAR AND CONVINCING EVIDENCE IN THIS CASE THAT
21 THE PATENT IS INVALID.

22 THE LAW ALSO PRESUMES, IN THE ABSENCE OF CLEAR AND
23 CONVINCING EVIDENCE, THAT THE PATENT & TRADEMARK OFFICE ACTED
24 CORRECTLY IN DECIDING THE RE-EXAMINATION PROCEEDINGS BROUGHT
25 BEFORE IT.

6 1 THE BURDEN OF PROOF THAT THE PATENT & TRADEMARK OFFICE
2 ERRED IN ISSUING A PATENT IS MADE MORE DIFFICULT BY THE FACT
3 THAT THE PATENT & TRADEMARK OFFICE RE-EXAMINATION PROCEEDING
4 UPHELD THE VALIDITY OF THE CLAIMS OF THE PATENT.

5 PTO RULINGS ARE EVIDENCE THAT YOU MUST CONSIDER IN
6 DETERMINING WHETHER DU PONT HAS OVERCOME THE PRESUMPTION OF
7 VALIDITY AND MET ITS BURDEN OF CLEAR AND CONVINCING EVIDENCE.

8 ALTHOUGH THE PATENTS ARE PRESUMED VALID, THE
9 PRESUMPTION MAY BE MORE EASILY OVERCOME IF THE CHALLENGER OF THE
10 PATENTS PRESENTS PRIOR ART THAT IS MORE PERTINENT THAN ANY
11 CONSIDERED BY THE PATENT & TRADEMARK OFFICE.

12 A FEDERAL COURT AND, HENCE, YOU ARE NOT BOUND BY A
13 PATENT EXAMINER'S DECISION IN RE-EXAMINATIONS.

14 AND KEEP IN MIND THERE'S A DIFFERENCE BETWEEN BEING
15 BOUND, BECAUSE YOU ARE NOT BOUND, AND THE PRESUMPTION OF
16 VALIDITY WHICH CREATES A PRESUMPTION THAT MUST BE OVERCOME BY
17 CLEAR AND CONVINCING EVIDENCE. THOSE ARE TWO DIFFERENT
18 CONCEPTS.

19 THAT IS, THE PTO PROCEEDINGS AND PROCEEDINGS BEFORE THE
20 COURT ARE INDEPENDENT AND MAY TAKE DIFFERENT APPROACHES AND
21 REACH DIFFERENT CONCLUSIONS AS TO THE VALIDITY OF THE PATENT.

22 THE PRESUMPTION OF VALIDITY IS NOT OVERCOME UNLESS YOU
23 ARE CONVINCED THAT CLEAR AND CONVINCING EVIDENCE DICTATES A
24 CONTRARY CONCLUSION.

25 IN DECIDING WHETHER DU PONT HAS MET ITS BURDEN OF

6
1 PROVING FACTS BY CLEAR AND CONVINCING EVIDENCE TO PROVE
2 INVALIDITY, YOU MUST FIND THAT THE EVIDENCE OFFERED IN SUPPORT
3 OF FACTS IS CREDIBLE.

4 THE FACTS TO WHICH THE WITNESSES HAVE TESTIFIED MUST
5 HAVE BEEN CLEAR, DIRECT AND OF SUFFICIENT WEIGHT TO ENABLE YOU
6 TO COME TO A CLEAR CONVICTION OF THE FACTS IN ISSUE.

7 INTRODUCTION OF MORE PERTINENT PRIOR ART THAN THAT
8 CONSIDERED BY THE PATENT & TRADEMARK OFFICE CAN MAKE IT EASIER
9 FOR THE CHALLENGER OF THE PATENT'S VALIDITY TO CARRY THE BURDEN
10 OF ESTABLISHING INVALIDITY BECAUSE THE DEFERENCE DUE TO THE
11 PATENT & TRADEMARK OFFICE'S DECISION IS REDUCED OR ELIMINATED
12 WHERE THE PATENT OFFICE HAS NOT APPLIED ITS EXPERTISE TO THE
13 ART.

14 HOWEVER, IT DOES NOT WEAKEN THE PRESUMPTION OF
15 VALIDITY, NOR DOES INTRODUCTION OF UNCONSIDERED PRIOR ART SHIFT
16 THE BASIC BURDEN OF PERSUASION.

17 IF DU PONT ASSERTS THE SAME PRIOR ART, OR PRIOR ART
18 THAT IS MERELY CUMULATIVE OF PRIOR ART THAT THE PATENT &
19 TRADEMARK OFFICE CONSIDERED IN THE APPLICATION OR RE-EXAMINATION
20 PROCESS TO INVALIDATE THE PATENT, IT HAS A BURDEN OF SHOWING
21 THAT THE PATENT & TRADEMARK OFFICE WAS WRONG.

22 IF DU PONT IS RELYING ON REFERENCES NOT CITED BY THE
23 PATENT & TRADEMARK OFFICE IN THE APPLICATION OR RE-EXAMINATION
24 PROCEDURES, THERE IS NO REASON FOR IT TO SHOW THAT THE PATENT &
25 TRADEMARK OFFICE WAS WRONG.

6
1 NEW PRIOR ART NOT BEFORE THE PATENT & TRADEMARK OFFICE
2 MAY INVALIDATE THE PATENT, PROVIDING EVIDENCE PROVING SUCH
3 INVALIDITY IS CLEAR AND CONVINCING.

4 NOW, I'M SURE THAT YOU HAVE DECIDED, AFTER HAVING
5 OBSERVED THE BLOWUPS OF THE CLAIMS AND THE VOLUME THAT'S BEEN
6 GIVEN TO YOU WITH VARIOUS MATERIALS, INCLUDING THE PATENTS, THAT
7 DECIPHERING A PATENT IS NOT THE EASIEST -- PATENT APPLICATION OR
8 PATENT GRANT IS NOT THE EASIEST THING TO DO.

9 THIS INSTRUCTION AND SOME OF THE FOLLOWING ONES ARE TO
10 ASSIST YOU IN THAT RESPECT, BECAUSE THE PATENTS ARE MADE UP OF A
11 VARIETY OF DIFFERENT SECTIONS AND THE IMPORTANCE OF EACH OF
12 THOSE WILL BE POINTED OUT THROUGH THESE INSTRUCTIONS.

13 THE PATENT IS A PRINTED DOCUMENT WHICH DESCRIBES AN
14 INVENTION. ONE PORTION OF THIS DOCUMENT IS CALLED THE
15 SPECIFICATION, WHICH IS A WRITTEN DESCRIPTION OF THE INVENTION,
16 INCLUDING EXAMPLES. THE PATENT ALSO HAS DRAWINGS WHICH
17 ILLUSTRATE THE INVENTION.

18 BOTH THE SPECIFICATION AND DRAWINGS CONSTITUTE WHAT IS
19 CALLED THE DISCLOSURE OF THE INVENTION.

20 THE FINAL PORTION OF THE PATENT INCLUDES A SET OF
21 NUMBERED CLAIMS. THE PATENT CLAIMS ARE THE NUMBERED PARAGRAPHS
22 AT THE END OF THE PATENTS.

23 THE PATENT CLAIMS INVOLVED HERE ARE CLAIMS 1 THROUGH 4,
24 6 THROUGH 9, 11 THROUGH 13, 15, 17, 19 AND 20 -- THAT'S OF THE
25 '202 PATENT -- BEGINNING AT COLUMN 27, LINE 20 -- STRIKE THAT --

7
1 LINE 31 OF THE '202. THAT IS EXHIBIT B IN EVIDENCE -- B-1,
2 EXCUSE ME, IN EVIDENCE, AND YOU HAVE IT IN -- IN THE VOLUMES
3 THAT YOU HAVE BEEN LOOKING AT THROUGHOUT THE TRIAL.

4 CLAIMS 1 THROUGH 6, 9, 11, 14 AND 15 BEGINNING AT
5 COLUMN 40, LINE 53, OF THE '195 PATENT ARE IN ISSUE HERE AS
6 WELL, AND THAT'S EXHIBIT B-2.

7 THE CLAIMS OF THE PATENT DEFINE THE INVENTION DESCRIBED
8 AND ILLUSTRATE IT IN THE PATENT. THE CLAIMS MARK THE LIMITS OF
9 THE INVENTION AND DEFINE ITS BOUNDARIES.

10 THE CLAIMS ARE DESCRIPTIONS OF THE PROCESS AND STEPS
11 MAKING IT UP THAT DEFINE THE SUBJECT MATTER THAT THE APPLICANT
12 REGARDS AS HIS INVENTION AT THE TIME THE PATENT ISSUES.

13 ONLY THE CLAIMS OF THE PATENTS ARE VALID OR INVALID.
14 NEITHER THE SPECIFICATION, WHICH IS THE WRITTEN DESCRIPTION
15 WE'VE ALREADY DISCUSSED, NOR THE DRAWINGS ARE SEPARATELY VALID
16 OR INVALID.

17 EACH OF THE CLAIMS MUST BE CONSIDERED INDIVIDUALLY.
18 THE CLAIMS ARE TO BE READ IN LIGHT OF THE SPECIFICATION AND
19 DRAWINGS FOUND IN THE PATENT; HOWEVER, LIMITATIONS APPEARING
20 ONLY IN THE SPECIFICATION SHOULD NOT BE READ INTO THE CLAIMS AND
21 SHOULD NOT BE USED TO DEFINE THE INVENTION.

22 YOU MAY, HOWEVER, USE THE SPECIFICATION OR DRAWINGS TO
23 HELP YOU TO UNDERSTAND WHAT THE PATENTEE MEANT BY A WORD OR
24 PHRASE IN THE CLAIM. HOWEVER, THIS DOES NOT MEAN THAT YOU MAY
25 READ INTO A CLAIM EXTRA ELEMENTS CONTAINED IN THE SPECIFICATION,

7
1 EXAMPLES OR DRAWINGS.

2 AS I'VE EXPLAINED, THE SPECIFICATION, EXAMPLES AND
3 DRAWINGS OF A PATENT DO NOT DEFINE THE BOUNDARIES OR LIMITS OF
4 THE INVENTION DISCLOSED IN THE PATENT. THE CLAIMS DO THAT, AND
5 THEREFORE ONLY THE CLAIMS CAN BE CONSIDERED FOR COMPARISON TO
6 THE PRIOR ART.

7 ADDITIONALLY, YOU MAY NOT USE A COMMERCIALIZED VERSION
8 OF THE INVENTION DISCLOSED IN THE PATENT, SUCH AS A COMMERCIAL
9 PRODUCT, TO DEFINE THE INVENTION. A COMMERCIAL PRODUCT IS
10 MERELY AN EMBODIMENT OR FORM OF THE INVENTION CLAIMED IN THE
11 PATENT.

12 THE COMMERCIAL PRODUCT MAY CONTAIN PARTS OR ELEMENTS
13 THAT ARE NOT IN THE PATENT CLAIMS; THEREFORE, YOU MUST NOT READ
14 SUCH PARTS OR LIMITATIONS WHICH APPEAR IN A COMMERCIAL
15 EMBODIMENT OF AN INVENTION INTO THE CLAIMS. THE INVENTION AS
16 CLAIMED IN THE PATENT IS NOT NECESSARILY THE SAME THING AS A
17 COMMERCIAL EMBODIMENT OF THE INVENTION.

18 NOW WE COME TO WHAT ARE THE FIRST GROUNDS FOR DU PONT'S
19 CHARGE OF INVALID -- INVALIDITY WITH RESPECT TO THE '202 PATENT.

20 YOU WILL KEEP IN MIND, FROM ONE OF THE EARLIER
21 INSTRUCTIONS I GAVE YOU, THAT THEY CONTEND INVALIDITY WITH
22 RESPECT TO SEVERAL TYPES OF PRIOR ART, AND WE WILL GO THROUGH
23 THOSE AT THIS TIME AND ALSO WHAT IS MEANT BY "ANTICIPATION"
24 WHICH IS THE GROUNDS FOR THAT.

25 THERE'S A SEPARATE GROUND CALLED OBVIOUSNESS, WHICH

7
1 WE'LL DEAL WITH LATER.

2 IF AN INVENTION IS NOT NEW, THEN THE INVENTION IS NOT
3 PATENTABLE; THEREFORE, ONE OF THE REQUIREMENTS FOR A VALID
4 PATENT IS THAT THE INVENTION DEFINED IN THE CLAIMS MUST BE NEW
5 OR NOVEL.

6 PLAINTIFF HAS ALLEGED THAT CLAIMS 1 THROUGH 4, 6
7 THROUGH 9, 11, 19 AND 20 OF THE '202 PATENT ARE INVALID BECAUSE
8 THEY LACK NOVELTY.

9 AN INVENTION LACKS NOVELTY WHEN IT HAS BEEN ANTICIPATED
10 BY CERTAIN PRIOR EVENTS THAT HAVE ALREADY PLACED THE INVENTION
11 IN THE POSSESSION OF THE PUBLIC.

12 THERE ARE SEVERAL CATEGORIES OF EVENTS, ALL DEFINED BY
13 THE PATENT STATUTE, THAT CAN ANTICIPATE OR INVALIDATE A PATENT.
14 IN THIS CASE, WE ARE CONCERNED WITH THREE OF THOSE EVENTS:

15 1. WHETHER THE PROCESS OF THE CHALLENGED CLAIM IN THE
16 '202 PATENT WAS KNOWN OR USED BY OTHERS IN THIS COUNTRY BEFORE
17 THE DEFENDANT'S ALLEGED INVENTION OR DISCOVERY;

18 2. WHETHER THE PROCESS OF THE CHALLENGED CLAIM IN THE
19 '202 PATENT WAS DESCRIBED IN A PRINTED PUBLICATION ANYWHERE IN
20 THE WORLD MORE THAN ONE YEAR BEFORE THE ALLEGED INVENTOR FILED
21 HIS PATENT APPLICATION; OR

22 3. WHETHER THE PROCESS OF THE CHALLENGED CLAIM IN THE
23 '202 PATENT WAS MADE IN THIS COUNTRY BEFORE DEFENDANT'S ALLEGED
24 INVENTION BY ANOTHER WHO HAD NOT ABANDONED, SUPPRESSED OR
25 CONCEALED THE SUBJECT MATTER OF THE INVENTION.

7
8
1 EACH OF THESE EVENTS HAS ITS OWN PARTICULAR
2 REQUIREMENTS, WHICH I WILL EXPLAIN TO YOU, BUT THEY ALL HAVE
3 SOME REQUIREMENTS IN COMMON.

4 IF YOU FIND THAT ANY OF THE EVENTS DESCRIBED ABOVE HAVE
5 OCCURRED, THE '202 PATENT IS ANTICIPATED AND INVALID.

6 ANTICIPATION IS ESTABLISHED WHEN IT IS SHOWN BY CLEAR
7 AND CONVINCING EVIDENCE THAT EACH ELEMENT OF ANY CLAIM AT ISSUE
8 IS FOUND IN ONE SINGLE PRIOR ART REFERENCE, WHICH MAY BE A PRIOR
9 PATENT, A PRIOR PRINTED PUBLICATION, A PRIOR INVENTION, PRIOR
10 KNOWLEDGE OR PRIOR PUBLIC USE.

11 ADDITIONALLY, IN ORDER TO BE ANTICIPATING, THE PRIOR
12 ART REFERENCE MUST BE CAPABLE, WHEN TAKEN IN CONJUNCTION WITH
13 THE KNOWLEDGE OF THOSE SKILLED IN THE ART TO WHICH IT PERTAINS,
14 OF PLACING THE INVENTION IN THE POSSESSION OF THE PUBLIC.

15 ANTICIPATION IS DETERMINED BY COMPARING THE PRIOR ART
16 REFERENCE WITH THE CLAIMS OF THE PATENT.

17 TO DECIDE WHETHER ANTICIPATION EXISTS IN THIS CASE, YOU
18 MUST CONSIDER SEPARATELY EACH CLAIM AT ISSUE IN THE '202 PATENT
19 AND EACH OF THE ELEMENTS REQUIRED IN THAT CLAIM AND THEN
20 DETERMINE WHETHER YOU FIND ALL OF THE ELEMENTS OF THE CLAIM IN
21 THE PARTICULAR PRIOR ART REFERENCE ALLEGED TO BE AN
22 ANTICIPATION, MEANING AN ANTICIPATION, ONE OF THE ANTICIPATING
23 PRIOR ART REFERENCES.

24 HOWEVER, A PRIOR ART REFERENCE NEED NOT DISCLOSE THE
25 ELEMENTS OF THE CLAIM IN LANGUAGE IDENTICAL TO THAT OF THE CLAIM

8 1 IN ORDER TO ANTICIPATE.

2 CONSIDERATION SUCH AS COMMERCIAL SUCCESS OF A CLAIMED
3 INVENTION, A CLAIM BY OTHERS IN THE FIELD, AND LONG-FELT NEED
4 FOR THE CLAIMED INVENTION ARE IRRELEVANT TO THE USE OF
5 ANTICIPATION. THEY ARE, HOWEVER, RELEVANT TO THE ISSUES OF
6 OBVIOUSNESS, SO KEEP THAT IN MIND, AND WE WILL DISCUSS THOSE
7 LATER. THOSE ARE NOT RELEVANT TO THE ISSUES OF ANTICIPATION.

8 FURTHERMORE, YOU MAY NOT COMBINE TWO OR MORE PRIOR ART
9 REFERENCES TO MAKE OUT AN ANTICIPATION.

10 YOU MAY TAKE -- OR SHOULD TAKE INTO ACCOUNT, HOWEVER,
11 CONSIDERATION, NOT ONLY WHAT IS EXPRESSLY DISCLOSED OR EMBODIED
12 IN A PARTICULAR ITEM OF PRIOR ART, BUT ALSO WHAT INHERENTLY
13 OCCURRED IN ITS PRACTICE.

14 IN OTHER WORDS, EVEN IF AN ELEMENT OF THE CLAIM IS NOT
15 EXPLICITLY DISCLOSED IN THE ITEM OF PRIOR ART, THE ITEM MAY
16 STILL ANTICIPATE AND THE NATURAL AND INVARIABLE PRACTICE OF THE
17 REFERENCE WOULD NECESSARILY AND INHERENTLY MEET ALL OF THE
18 ELEMENTS OF THE CLAIM.

19 HOWEVER, THE RULE THAT AN ELEMENT OF THE CLAIM DOES NOT
20 HAVE TO BE EXPLICITLY DISCLOSED IN A PRIOR ART REFERENCE, IF IT
21 IS INHERENT IN THE PRIOR ART, DOES NOT APPLY WHERE THE PRODUCT
22 OF THE ALLEGEDLY ANTICIPATING INVENTION WAS PRODUCED IN
23 MINISCULE AMOUNTS AND UNDER SUCH CONDITIONS THAT ITS PRODUCTION
24 WAS UNDETECTABLE.

25 DU PONT MUST PROVE BY CLEAR AND CONVINCING EVIDENCE

8
1 THAT INHERENCY IS CERTAIN.

2 THAT AN EVENT MAY RESULT FROM A GIVEN SET OF
3 CIRCUMSTANCES IS NOT SUFFICIENT TO ESTABLISH ANTICIPATION.
4 PROBABILITIES, POSSIBILITIES AND SPECULATION ARE NOT SUFFICIENT.

5 IF THE DISCLOSURE IS SUFFICIENT TO SHOW THAT THE
6 NATURAL RESULT FLOWING FROM THE OPERATION AS TAUGHT WOULD RESULT
7 IN THE PERFORMANCE OF THE QUESTIONED FUNCTION, THEN, HOWEVER,
8 THE DISCLOSURE SHOULD BE REGARDED AS SUFFICIENT.

9 THERE CANNOT BE AN UNINTENTIONAL OR UNRECOGNIZED
10 ANTICIPATION. A PRIOR INSTANCE OF THE CLAIMED INVENTION THAT
11 WAS ACCIDENTAL OR UNRECOGNIZED, UNAPPRECIATED AND INCIDENTAL TO
12 SOME OTHER PURPOSE IS NOT AN INVALIDATING ANTICIPATION.

13 WHEN A CLAIM COVERS MORE THAN ONE EMBODIMENT OF AN
14 INVENTION, THE CLAIM IS ANTICIPATED IF ANY ONE OF THE
15 EMBODIMENTS IS IN THE PRIOR ART.

16 USING THE ANALYSIS JUST DESCRIBED, IF THE PROCESS
17 CLAIMED, FOR EXAMPLE, IN THE '202 PATENT WAS KNOWN BY OTHERS IN
18 THIS COUNTRY BEFORE IT WAS INVENTED BY DR. MULLIS, THEN YOU MUST
19 FIND THAT THE '202 PATENT IS ANTICIPATED AND THEREFORE INVALID.

20 "KNOWN" IN THIS CONTEXT MEANS KNOWLEDGE THAT IS
21 ACCESSIBLE TO THE PUBLIC CONCERNED WITH THE ART AS OPPOSED TO
22 PRIVATE OR SECRET KNOWLEDGE.

23 AN INVENTION IS ANTICIPATED IF IT WAS USED BY OTHERS
24 BEFORE IT WAS INVENTED BY THE PATENT -- BY THE PATENTEE.

25 "USE" IN THIS CONTEXT MEANS AN OPERABLE AND PUBLIC USE

8 1 OF THE INVENTION FOR ITS INTENDED PURPOSE.

2 AND PUBLIC USE IS ANY USE OF THE INVENTION BY A PERSON
3 OTHER THAN THE INVENTOR OF THE PATENT IN SUIT WHO IS UNDER NO
4 LIMITATION, RESTRICTION OR OBLIGATION OF SECRECY TO THE
5 INVENTOR.

6 AN INVENTION IS PUBLICLY USED WHEN IT IS ACCESSIBLE TO
7 ANY MEMBER OF THE PUBLIC, EVEN A SINGLE PERSON, WHETHER OR NOT
8 THE PUBLIC COULD REASONABLY LEARN THE INVENTION BY ANALYZING OR
9 INSPECTING THE THING USED.

10 THE OBJECTIVE SOUGHT IN REQUIRING INDEPENDENT
11 CORROBORATION OF REDUCTION TO PRACTICE OF AN INVENTION IS TO
12 INSURE THAT THE INVENTOR ACTUALLY PREPARED THE INVENTION AND
13 KNEW IT WOULD WORK.

14 HOWEVER, THE NOTION THAT EACH INDIVIDUAL ACT OF
15 REDUCTION TO PRACTICE MUST BE PROVED IN DETAIL BY AN UNBROKEN
16 CHAIN OF CORROBORATION IS INCORRECT.

9 17 THE STANDARD IS NOT INFLEXIBLE AND IS NOT TO BE APPLIED
18 MECHANICALLY; HENCE, A RULE OF REASON APPROACH IS REQUIRED.

19 THIS RULE OF REASON, WHICH WAS DEVELOPED OVER THE YEARS
20 IN ORDER TO EASE THE REQUIREMENT OF CORROBORATION, USUALLY IS
21 APPLIED WHEN ESTABLISHING ACTUAL REDUCTION TO PRACTICE.

22 THE RULE SUGGESTS A REASONED EXAMINATION, ANALYSIS AND
23 EVALUATION OF ALL PERTINENT EVIDENCE SO THAT A SOUND
24 DETERMINATION OF THE CREDIBILITY OF THE INVENTOR'S THEORY MAY
25 BE -- OR STORY MAY BE REACHED.

1 ALTHOUGH THE RULE OF REASON DOES NOT DISPENSE WITH THE
2 REQUIREMENT OF SOME EVIDENCE FOR INDEPENDENT CORROBORATION,
3 THERE IS NO SINGLE FIXED CORROBORATIVE FORMULA. DOCUMENTARY
4 EVIDENCE AND THE ACTIVITIES OF OTHERS MAY BE CORROBORATION.

5 (PAUSE IN PROCEEDINGS)

6 THE COURT: ACTUALLY, THAT WAS A -- I THINK AN
7 EXPLANATION OF THE FOLLOWING, AND THIS HAS TO DO AGAIN WITH
8 CORROBORATION, SO KEEP THAT IN MIND:

9 ALTHOUGH IN SOME CIRCUMSTANCES UNSUPPORTED ORAL
10 TESTIMONY CAN BE SUFFICIENT TO PROVE PRIOR KNOWLEDGE OR USE, IT
11 MUST BE REGARDED WITH SUSPICION AND SUBJECTED TO CLOSE SCRUTINY.

12 IN THE ABSENCE OF CONTEMPORANEOUS DOCUMENTARY OR
13 PHYSICAL EVIDENCE TO CORROBORATE IT, ORAL TESTIMONY IS GENERALLY
14 INSUFFICIENT TO SHOW ANTICIPATION OF AN ISSUED PATENT WITHIN THE
15 MEANING OF 35 USC SECTION 102.

16 UNCORROBORATED WRITINGS OFFERED BY AN ALLEGED EARLIER
17 INVENTOR ARE INSUFFICIENT TO ESTABLISH PRIOR INVENTION.

18 AND THEN THE EARLIER INSTRUCTION EXPLAINED TO YOU THE
19 DIFFICULTY OF INDEPENDENT CORROBORATION AND THE RULE OF REASON.
20 AND, ALSO, SECTION 102 AS IT IS REFERRED TO IN THIS SECTION
21 MERELY IS ANOTHER WAY OF REFERRING TO ANTICIPATION -- THE
22 ANTICIPATION THEORY.

23 YOU'VE HEARD REFERRED TO EARLIER THE VARIOUS BASES UPON
24 WHICH -- OR MEANS BY WHICH PRIOR ART MAY BE REFLECTED AND WHAT
25 MAY CONSTITUTE PRIOR ART. THE FOLLOWING HAS TO DO WITH PRINTED

9
1 PUBLICATIONS:

2 A PATENT IS INVALID IF THE INVENTION DEFINED BY THE
3 CLAIMS WAS DESCRIBED IN A PRINTED PUBLICATION BEFORE IT WAS
4 INVENTED BY THE PATENTEE OR MORE THAN ONE YEAR PRIOR TO THE
5 FILING DATE OF HIS APPLICATION.

6 THE ESSENCE OF A PRINTED PUBLICATION IS ACCESSIBILITY
7 TO THE PUBLIC. IT MUST BE REASONABLY ACCESSIBLE TO AT LEAST
8 SOME SEGMENT OF THE PUBLIC.

9 SO LONG AS THE REQUIRED ACCESSIBILITY OR DISSEMINATION
10 IS SHOWN, THE MANNER IN WHICH THE INFORMATION IS RECORDED IS
11 UNIMPORTANT. IT IS ONLY REQUIRED THAT THE INFORMATION BE
12 MAINTAINED IN SOME PERMANENT FORM, SUCH AS MAGNETIC TAPE,
13 MICROFILM, PHOTOGRAPHS, PHOTOCOPIES, ET CETERA.

14 IT IS NOT NECESSARY THAT THE PRINTED PUBLICATION BE
15 AVAILABLE TO EVERY MEMBER OF THE PUBLIC. IT MUST BE AVAILABLE
16 WITHOUT RESERVATION TO THAT SEGMENT OF THE PUBLIC MOST LIKELY TO
17 AVAIL ITSELF OF THE PUBLICATION'S DOCUMENTS OR CONTENTS.

18 FOR A PUBLICATION TO CONSTITUTE AN ANTICIPATION OF AN
19 INVENTION, IT MUST BE CAPABLE, WHEN TAKEN IN CONJUNCTION WITH
20 THE KNOWLEDGE OF PEOPLE OF ORDINARY SKILL IN THE ART, OF PLACING
21 THE INVENTION IN THE POSSESSION OF THE READER.

22 THE DISCLOSURE MUST BE ENABLING AND MEANINGFUL. IT
23 MUST CLEARLY DESCRIBE THE PATENTED INVENTION AND MAKE IT
24 POSSIBLE FOR ONE OF ORDINARY SKILL IN THE ART TO PRACTICE THE
25 PATENTED INVENTION WITHOUT UNDUE EXPERIMENTATION.

9 1 THE DESCRIPTION MUST BE SO FULL, CLEAR AND EXACT AS TO
2 ENABLE ONE SKILLED IN THE ART TO PRACTICE THE PROCESS WITHOUT
3 HAVING TO DEPEND ON EITHER THE PATENT OR HIS OWN INVENTIVE
4 SKILLS.

5 IF THE DESCRIPTION OFFERS NO MORE THAN A STARTING POINT
6 FOR FURTHER EXPERIMENTS, OR IF SUCCESS IS UNCERTAIN, IT IS NOT
7 SUFFICIENT.

8 IN DETERMINING WHETHER THE DISCLOSURE IS COMPLETE,
9 ENABLING AND MEANINGFUL, YOU SHOULD TAKE INTO ACCOUNT WHAT WOULD
10 HAVE BEEN WITHIN THE KNOWLEDGE OF A PERSON OF ORDINARY SKILL IN
11 THE ART AT THE TIME, AND YOU MAY CONSIDER OTHER PUBLICATIONS
12 WHICH SHED LIGHT ON THE KNOWLEDGE SUCH A PERSON WOULD HAVE HAD.

13 ANOTHER TYPE OF PRIOR ART FOR THESE PURPOSES ARE PRIOR
14 INVENTIONS.

15 THE '202 PATENT IS INVALID FOR LACK OF NOVELTY IF THE
16 INVENTION DEFINED BY THE CLAIMS WAS INVENTED BY ANOTHER PERSON
17 IN THE UNITED STATES BEFORE IT WAS INVENTED BY DR. MULLIS AND
18 THAT OTHER PERSON DID NOT ABANDON, SUPPRESS OR CONCEAL THE
19 INVENTION.

20 IN THIS CASE, TO BE A PRIOR INVENTION, THE PATENTED
21 PROCESS CLAIMED IN THE '202 PATENT MUST HAVE ACTUALLY BEEN
22 CARRIED OUT AND SUFFICIENTLY TESTED TO DEMONSTRATE THAT IT WOULD
23 WORK FOR ITS INTENDED PURPOSE BEFORE THE PROCESS WAS INVENTED BY
24 DR. MULLIS.

25 A PRIOR INVENTION, EVEN IF PUT IN PHYSICAL FORM AND

9
1 SHOWN TO PRODUCE THE DESIRED RESULT, IS NOT AN INVALIDATING
2 ANTICIPATION UNLESS SOME STEPS WERE TAKEN TO BRING IT TO THE
3 ATTENTION OF THOSE WHO MAY BENEFIT FROM THE INVENTION.

4 THUS, YOU MAY CONSIDER, AMONG OTHER THINGS, FAILURE TO
5 FILE A PATENT APPLICATION, TO DESCRIBE THE INVENTION PUBLICLY,
6 OR TO USE THE INVENTION PUBLICLY. HOWEVER, IT IS NOT NECESSARY
7 THAT THE PATENTEE HAD KNOWLEDGE OF THAT PRIOR INVENTION.

8 IT IS AN ELEMENTARY PRINCIPLE OF PATENT LAW THAT WHEN A
9 CLAIM COVERS SEVERAL VERSIONS OF A PROCESS, THE CLAIM IS
10 ANTICIPATED IF ANY ONE OF THOSE VERSIONS OF THE PROCESS IS IN
11 ANY SINGLE PRIOR ART REFERENCE.

12 BY WAY OF EXAMPLE IN THIS CASE, CLAIM 7 OF THE '202
13 PATENT AND CLAIM 15 OF THE '195 PATENT BOTH SPECIFY THE USE OF
14 AN ENZYME WHICH IS TO BE SELECTED FROM A GROUP OF ENZYMES.
15 THEREFORE, EITHER CLAIM IS INVALID IF THE PROCESS DEFINED BY
16 THOSE CLAIMS CONTAINING ANY ONE OF THE ENZYMES SPECIFIED IN THE
17 GROUP OF ENZYMES IS FOUND IN THE PRIOR ART.

18 THE FOLLOWING INSTRUCTIONS APPLY TO . . . THE ISSUE OF
19 OBVIOUSNESS, WHICH IS SEPARATE AND APART.

20 AND A LITTLE BIT LATER, I WILL EXPLAIN TO YOU THE
21 VERDICT FORMS, BECAUSE YOU WILL BE ASKED TO RENDER YOUR VERDICT
22 AND TO MAKE IT CLEAR IN THE VERDICT FORM YOUR DECISIONS AS TO
23 EACH CLAIM ON OBVIOUSNESS AND ON ANTICIPATION.

24 THE OBVIOUSNESS CLAIM APPLYING -- OR BASES FOR
25 INVALIDITY APPLY TO BOTH THE '202 AND THE '195 PATENT.

10 1 IN ORDER TO BE PATENTABLE, AN INVENTION MUST NOT HAVE
2 BEEN OBVIOUS TO A PERSON OF ORDINARY SKILL IN THE PERTINENT ART
3 AT THE TIME THE INVENTION WAS MADE.

4 IN THIS CASE, PLAINTIFF DU PONT ASSERTS THAT THE '202
5 AND '195 PATENTS ARE INVALID BECAUSE THEY CLAIM PROCESSES THAT
6 WERE OBVIOUS OVER THE PRIOR ART.

7 THE ISSUE IS NOT WHETHER THE CLAIMED INVENTION WOULD BE
8 OBVIOUS TO YOU AS A LAY PERSON, TO ME AS A JUDGE, OR TO A GENIUS
9 IN THE ART, BUT WHETHER THE INVENTION WOULD HAVE BEEN OBVIOUS TO
10 ONE OF ORDINARY SKILL IN THE ART AT THE TIME IT WAS MADE.

11 YOU CAN CONCLUDE THAT EITHER OR BOTH THE '202 AND THE
12 '195 PATENTS GRANTED BY THE PATENT & TRADEMARK OFFICE ARE
13 INVALID EVEN THOUGH NOT ANTICIPATED OR IDENTICALLY DISCLOSED IN
14 THE SINGLE PRIOR ART REFERENCE IF DU PONT HAS ESTABLISHED THAT
15 THE PROCESSES CLAIMED IN THE '202 AND '195 PATENTS WOULD HAVE
16 BEEN OBVIOUS TO A PERSON OF ORDINARY SKILL IN THE PERTINENT ART
17 IN OR BEFORE 1983.

18 IN DETERMINING WHETHER DU PONT HAS ESTABLISHED
19 OBVIOUSNESS OF THE PROCESSES CLAIMED IN THE '202 AND '195
20 PATENTS, YOU SHOULD TAKE THE FOLLOWING STEPS, EACH OF WHICH I
21 WILL EXPLAIN MORE FULLY LATER:

22 COMPARE THE SCOPE AND CONTENT OF THE PRIOR ART RELIED
23 UPON BY DU PONT AGAINST EACH OF THE CLAIMS OF THE TWO PATENTS.

24 REMEMBER THAT EACH PATENT MUST BE CONSIDERED
25 SEPARATELY.

1 IDENTIFY THE DIFFERENCE OR DIFFERENCES BETWEEN EACH
2 CLAIM OF EACH OF THE PATENTS AND THE PRIOR ART, TAKING THE
3 TEACHINGS OF THE PRIOR ART AS A WHOLE.

4 DETERMINE THE LEVEL OF ORDINARY SKILL IN THE PERTINENT
5 ART AT THE TIME THE INVENTIONS OF THE PATENTS IN SUIT WERE MADE.

6 FOR THE '202 AND '195 PATENTS, YOU MUST CONSIDER WHAT
7 THE LEVEL OF ORDINARY SKILL WAS WHEN THE PATENT INVENTIONS WERE
8 MADE.

9 AGAINST THIS BACKGROUND, YOU WILL THEN MAKE YOUR
10 CONCLUSION AS TO WHETHER THE EVIDENCE CLEARLY AND CONVINCINGLY
11 ESTABLISHES THAT ANY PROCESS ENCOMPASSED BY THE CLAIMS OF EITHER
12 OR BOTH PATENTS IN SUIT WOULD HAVE BEEN OBVIOUS TO A PERSON OF
13 ORDINARY SKILL IN THE PERTINENT ART AT THE TIME THE INVENTIONS
14 DISCLOSED IN THE '202 AND '195 PATENTS WERE MADE.

15 UNLIKE THE ISSUE OF ANTICIPATION, WHEN CONSIDERING THE
16 ISSUE OF OBVIOUSNESS, IT IS NOT REQUIRED THAT YOU FIND THE
17 SUBJECT MATTER OF CETUS' PATENTS OBVIOUS FROM A SINGLE PRIOR ART
18 REFERENCE.

19 IF YOU ARE CONVINCED THAT ONE OF ORDINARY SKILL IN THE
20 PERTINENT ART WOULD HAVE FOUND IT OBVIOUS TO COMBINE ELEMENTS
21 AND SUGGESTIONS FROM TWO OR MORE PRIOR ART REFERENCES SO AS TO
22 PRODUCE THE CLAIMED INVENTION, THEN YOU SHOULD FIND THE PATENT
23 INVALID FOR OBVIOUSNESS.

24 HOWEVER, BEFORE REACHING SUCH A CONCLUSION, YOU MUST
25 ALSO CONSIDER EVIDENCE SUBMITTED WHICH MAY NEGATE PLAINTIFF'S

1 EVIDENCE OF OBVIOUSNESS, SUCH AS:

2 1. THE COMMERCIAL SUCCESS OF THE PROCESS COVERED BY
3 THE PATENTS IN THE SUIT DUE TO THE MERITS OF THE INVENTION AND
4 NOT TO OTHER FACTORS SUCH AS ADVERTISING AND PROMOTION;

5 2. LONG-FELT NEED BUT UNRESOLVED NEED IN THE ART WHICH
6 WAS FILLED BY THE INVENTIONS OF THE PATENTS IN SUIT;

7 3. FAILURE OF OTHERS TO MAKE THE INVENTIONS;

8 4. COPYING OF THE INVENTION BY OTHERS IN THE FIELD;

9 5. UNEXPECTED RESULTS ACHIEVED BY THE INVENTIONS;

10 6. PRAISE OF THE INVENTION BY OTHERS IN THE FIELD,
11 INCLUDING BY THE INFRINGER;

12 7. THE TAKING OF LICENSES UNDER THE PATENTS BY OTHERS;

13 8. EXPRESSIONS OF DISBELIEF BY EXPERTS AND THOSE
14 SKILLED IN THE ART;

15 9. THE PATENTEE PROCEEDED CONTRARY TO ACCEPTED WISDOM
16 OF PRIOR ART.

17 THOSE ARE MATTERS WHICH YOU SHOULD CONSIDER IN
18 DETERMINING THE ISSUE OF OBVIOUSNESS.

19 HOWEVER, YOU MUST BE SATISFIED THAT THERE'S A CAUSAL
20 CONNECTION BETWEEN THE EVIDENCE SHOWING THE EXISTENCE OF ONE OR
21 MORE OF THESE FACTORS AND THE CLAIM -- CLAIMED INVENTION.
22 EXCUSE ME.

23 FOR EXAMPLE, BEFORE COMMERCIAL SUCCESS CAN EVEN BE
24 CONSIDERED IN DETERMINING WHETHER AN IMPROVEMENT IN THE
25 PROCESSES AMOUNTS TO INVENTION, THE EVIDENCE IN THE CASE MUST

11

1 SHOW THAT THE COMMERCIAL SUCCESS WAS DUE TO OR ATTRIBUTABLE TO
2 THE CLAIMED INVENTION RATHER THAN TO SOME OTHER CONSIDERATION
3 SUCH AS ADVERTISING, PROMOTION, SALESMANSHIP AND THE LIKE.

4 COMMERCIAL SUCCESS MAY NOT BE CONSIDERED BY YOU AS
5 EVIDENCE OF NON-OBVIOUSNESS IF IT WAS DUE TO FEATURES OF THE
6 COMMERCIAL CPR TECHNOLOGY -- PCR TECHNOLOGY OTHER THAN THOSE
7 CLAIMED IN THE '202 AND THE '195 PATENT.

8 TO FIND OBVIOUSNESS, ALL THAT IS REQUIRED IS THAT A
9 PERSON OF ORDINARY SKILL IN THE ART, UPON REVIEWING THE PRIOR
10 ART AS A WHOLE, HAVE HAD A REASONABLE EXPECTATION OF SUCCESS IN
11 ACHIEVING THE INVENTION.

12 THE QUESTION OF NON-OBVIOUSNESS IS DIFFICULT TO ANSWER.
13 A PERSON OF ORDINARY SKILL IN THE ART IS PRESUMED TO HAVE
14 KNOWLEDGE OF THE RELEVANT PRIOR ART AT THE TIME OF THE
15 PATENTEE'S INVENTION.

16 IF YOU FIND THE AVAILABLE PRIOR ART SHOWS EACH OF THE
17 ELEMENTS OF THE CLAIMS IN SUIT, YOU MUST DETERMINE WHETHER IT
18 WOULD THEN HAVE BEEN OBVIOUS TO A PERSON OF ORDINARY SKILL IN
19 THE ART TO COMBINE OR COORDINATE THESE ELEMENTS IN THE SAME
20 MANNER AS THE CLAIMS IN SUIT.

21 THE DIFFICULTY THAT ATTACHES TO ALL HONEST ATTEMPTS TO
22 ANSWER THIS QUESTION CAN BE ATTRIBUTED TO THE STRONG TEMPTATION
23 TO RELY ON HINDSIGHT WHILE UNDERTAKING THIS EVALUATION.

24 IT IS WRONG TO USE THE PATENT IN SUIT AS A GUIDE
25 THROUGH THE MAZE OF PRIOR ART REFERENCES, COMBINING THE RIGHT

11 1 REFERENCES IN THE RIGHT WAY SO AS TO ACHIEVE THE RESULT OF THE
2 CLAIMS IN SUIT.

3 YOU'RE ALSO INSTRUCTED THAT WHEN YOU CONSIDER THE PRIOR
4 ART, WHETHER IN THE FORM OF WRITINGS, PHYSICAL EXHIBITS OR
5 PATENTS, YOU MUST CONSIDER THEM FOR WHAT THEY ACTUALLY DISCLOSE
6 TO ONE OF ORDINARY SKILL IN THE ART AND NO MORE.

7 YOU CANNOT USE HINDSIGHT TO ASSEMBLE THE INFORMATION
8 FROM PARTS MADE UP OF INDIVIDUAL ELEMENTS OF THE PRIOR ART
9 DEVICES, NOR CAN YOU RECONSTRUCT ANY OF THE PRIOR ART DEVICES OR
10 MATERIALS UNLESS OBVIOUS TO ONE OF ORDINARY SKILL IN THE ART TO
11 DO SO.

12 THE EVIDENCE MIGHT INDICATE TO YOU THAT WHAT THE
13 INVENTORS DID WAS OBVIOUS TO TRY. IF SO, THIS DOES NOT
14 NECESSARILY INDICATE THE PATENT IS INVALID FOR OBVIOUSNESS.

15 OBVIOUS TO -- OBVIOUS TO TRY IS NOT THE STANDARD. THE
16 STANDARD IS WHETHER THE INVENTION AS A WHOLE WOULD HAVE BEEN
17 OBVIOUS TO ONE OF ORDINARY SKILL IN THE FIELD TO WHICH THE
18 INVENTION PERTAINS AT THE TIME THE INVENTION WAS MADE.

19 AN INVENTION IS OBVIOUS WHEN THE PRIOR ART PROVIDES A
20 SUFFICIENT BASIS FOR A REASONABLE EXPECTATION OF SUCCESS.

21 (PAUSE IN PROCEEDINGS)

22 THE COURT: WE DOING ALL RIGHT OVER THERE?

23 ONLY A FEW MORE. CAN YOU STAY WITH IT?

24 THE JURORS: (NODDING HEADS.)

25 THE COURT: I TOLD YOU THIS WAS NOT THE EXCITING PART

11 1 OF THE TRIAL. OKAY. BUT IT'S IMPORTANT THAT -- IT'S IMPORTANT
2 THAT YOU GET IT, SO . . .

3 NOW WE'RE GOING TO TALK ABOUT PRIOR ART AND WHAT PRIOR
4 ART MEANS IN THIS CONTEXT.

5 IN ARRIVING AT YOUR DECISION OF WHETHER OR NOT THE
6 CLAIMED INVENTION IS OBVIOUS, YOU MUST FIRST DETERMINE THE SCOPE
7 AND THE CONTENT OF THE PRIOR ART.

8 THE PRIOR ART INCLUDES THE FOLLOWING ITEMS RECEIVED
9 INTO EVIDENCE DURING THE TRIAL:

10 PATENTS THAT ISSUED MORE THAN ONE YEAR BEFORE THE
11 FILING DATE OF THE PATENT OR BEFORE THE DATE OF INVENTION;

12 PUBLICATIONS HAVING A DATE MORE THAN ONE YEAR BEFORE
13 THE FILING DATE OF THE PATENT OR BEFORE THE DATE OF INVENTION;

14 U.S. PATENTS THAT HAVE A FILING DATE PRIOR TO THE DATE
15 OF INVENTION OF THE CLAIMED SUBJECT MATTER IN THE PATENT;

16 ANYTHING THAT WAS KNOWN PUBLICLY OR USED BY OTHERS IN
17 THIS COUNTRY BEFORE THE DATE OF INVENTION OF THE CLAIMED SUBJECT
18 MATTER IN THE PATENT;

19 AND ANYTHING THAT WAS MADE OR BUILT OR ANY PROCESS
20 PERFORMED IN THIS COUNTRY BY ANOTHER PERSON BEFORE THE DATE OF
21 THE INVENTION OF THE CLAIMED SUBJECT MATTER IN THE PATENT WHERE
22 THE THING MADE OR BUILT OR THE PROCESS PERFORMED WAS NOT
23 ABANDONED, SUPPRESSED OR CONCEALED.

24 THE PRIOR ART THAT IS RELEVANT IN EVALUATING THE CLAIM
25 OF OBVIOUSNESS IS DEFINED BY THE NATURE OF THE PROBLEM

11 1 CONFRONTING THE WOULD-BE INVENTOR.

2 THE SCOPE OF THE PRIOR ART HAS BEEN DEFINED AS THAT
3 REASONABLY PERTINENT TO THE PARTICULAR PERSON -- STRIKE THAT --
4 TO THE PARTICULAR PROBLEM WITH WHICH THE INVENTOR WAS INVOLVED.

5 THE SECOND FACTOR THAT YOU MUST CONSIDER IN DETERMINING
6 WHETHER THE DISPUTED CLAIMS IN THE '202 AND '195 PATENTS ARE
7 INVALID FOR OBVIOUSNESS INVOLVE THE DIFFERENCE OR DIFFERENCES,
8 IF ANY, WHICH EXIST BETWEEN THE PRIOR ART AND THE INVENTIONS
9 CLAIMED IN THE PATENTS IN SUIT.

10 EACH CLAIM OF EACH PATENT MUST BE CONSIDERED IN ITS
11 ENTIRETY AND SEPARATELY FROM THE OTHER CLAIMS.

12 IN DETERMINING OBVIOUSNESS, IT IS PROPER FOR YOU TO
13 NOTE ANY DIFFERENCES BETWEEN THE DISPUTED CLAIMS IN THE '202 AND
14 '195 PATENTS, AND THE PRIOR ART. HOWEVER, YOU ARE TO COMBINE
15 THE TEACHINGS OF THE VARIOUS PRIOR ART PUBLICATIONS AND
16 PRACTICES, TAKING THOSE TEACHINGS AS A WHOLE, IN ORDER TO
17 DETERMINE WHETHER THE CLAIMED INVENTIONS WOULD HAVE BEEN OBVIOUS
18 TO ONE OF ORDINARY SKILL IN THE PERTINENT ART IN LIGHT OF ALL OF
19 THE PRIOR ART AT ISSUE IN THE CASE.

20 IN EVALUATING OBVIOUSNESS, YOU MUST ALSO CONSIDER THE
21 PRIOR ART AS A WHOLE, INCLUDING THOSE PARTS THAT TEACH AWAY FROM
22 THE CLAIMED INVENTION AS WELL AS THOSE POINTING TOWARD IT.

23 IT IS IMPROPER TO COMBINE PRIOR ART REFERENCES TO
24 PRODUCE THE INVENTION UNLESS SOME TEACHING, SUGGESTION OR
25 INCENTIVE IN THE PRIOR ART SUPPORTS THE COMBINATION.

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WE REFERRED FREQUENTLY TO THE TERM SOMEONE WHO IS --
WITH ORDINARY SKILL IN THE PERTINENT ART, AND WHAT THAT MEANS IS
AS FOLLOWS. YOU ARE TO CONSIDER THE FOLLOWING WITH RESPECT TO
THAT:

THE EDUCATIONAL LEVEL OF THE INVENTOR; THE TYPES OF
PROBLEMS ENCOUNTERED IN THE ART; THE PRIOR ART PATENTS AND
PUBLICATIONS; THE ACTIVITIES OF OTHERS; PRIOR ART SOLUTIONS TO
THE PROBLEM ENCOUNTERED BY THE INVENTOR; THE SOPHISTICATION OF
THE TECHNOLOGY; AND THE EDUCATION OF OTHERS WORKING IN THE
FIELD.

IT IS NOT NECESSARY THAT THIS PERSON HAVE INVENTIVE
SKILL. REMEMBER THAT THE TOUCHSTONE IS ORDINARY SKILL IN THE
PERTINENT ART.

COUNSEL, ARE THERE ANY OTHER INSTRUCTIONS THAT YOU
CONTEMPLATED THAT I GIVE OTHER THAN WHAT HAVE ALREADY BEEN RULED
UPON?

(PAUSE IN PROCEEDINGS)

MR. LEWIS: (SHAKING HEAD.)

THE COURT: IT'S HARD TO BELIEVE THERE COULD BE
ANYTHING ELSE; RIGHT?

MR. FIGG: NO, YOUR HONOR.

THE COURT: OKAY. THERE IS A VERDICT FORM.

I DON'T HAVE THE FINAL COPY, AND SO IT'S GOING TO BE A
LITTLE HARD FOR ME TO ACTUALLY HOLD IT UP AND SHOW IT TO YOU,
BUT I THINK WHILE WE'RE ON THE SUBJECT OF THE INSTRUCTIONS, LET

12 1 ME EXPLAIN TO YOU BRIEFLY -- AND THEN I'LL GO OVER IT IN MORE
2 DETAIL WHEN WE HAVE THE CONCLUDING INSTRUCTIONS -- THE VERDICT
3 FORM.

4 THE VERDICT FORM IS REALLY A SET OF WHAT IS CALLED
5 INTERROGATORIES OR QUESTIONS TO THE JURY, AND IT'S DIVIDED UP
6 ACCORDING TO THE PATENT IN ISSUE AND THE ISSUES WITH RESPECT TO
7 THOSE PATENTS.

8 SO FOR THE '202 PATENT, YOU ARE FIRST ASKED TO DECIDE
9 UPON THE ISSUE OF ANTICIPATION, AND YOU ARE ASKED THE FOLLOWING
10 QUESTIONS:

11 1. FOR EACH OF THE FOLLOWING CLAIMS OF THE '202
12 PATENT, IS THE CLAIM INVALID IN ACCORDANCE WITH THE INSTRUCTIONS
13 THAT YOU HAVE BEEN GIVEN BECAUSE ANY PROCESS COVERED BY THE
14 CLAIM IS ANTICIPATED BY A PRINTED PUBLICATION?

15 AND THEN EACH OF THE CLAIMS THAT IS IN ISSUE IS
16 ENUMERATED WITH A PLACE FOR YOU TO CHECK YES OR NO.

17 AND, OF COURSE, YOU'LL RECALL THAT YOU WERE GIVEN AN
18 INSTRUCTION ON WHAT IS MEANT BY "PRINTED PUBLICATION" FOR THAT
19 PURPOSE.

20 NUMBER TWO ASKS YOU ESSENTIALLY THE SAME QUESTION BUT
21 WITH RESPECT TO PROCESSES THAT WERE KNOWN OR USED BY OTHERS IN
22 THE UNITED STATES BEFORE THE INVENTION THEREOF BY DR. MULLIS.
23 AND, AGAIN, ANSWERING SEPARATELY WITH RESPECT TO EACH OF THE
24 CLAIMS.

25 THE THIRD, AGAIN, STILL ON ANTICIPATION UNDER THE '202

12

1 CLAIM, WHETHER ANY PROCESS COVERED BY THE CLAIM WAS INVENTED IN
2 THE UNITED STATES BY ANOTHER WHO HAD NOT ABANDONED, SUPPRESSED
3 OR CONCEALED IT PRIOR TO ITS INVENTION BY DR. MULLIS.

4 AND, AGAIN, THE CLAIMS LISTED, AND FOR YOU TO ANSWER
5 YES OR NO. AND, OF COURSE, AGAIN, YOU WILL HAVE TO GO BACK AND
6 REVIEW THE INSTRUCTION AS TO WHAT IS -- WHAT CONSTITUTES
7 ABANDONMENT, SUPPRESSION OR CONCEALMENT AND WHETHER THE FACTS
8 SUPPORT SUCH A FINDING.

9 FOR EACH OF THE FOLLOWING -- NUMBER FOUR IS: FOR EACH
10 OF THE FOLLOWING CLAIMS UNDER THE '202 PATENT, AGAIN THE
11 ANTICIPATION ISSUE, WHETHER ANY PROCESS COVERED BY THE CLAIM
12 WOULD HAVE BEEN OBVIOUS.

13 EXCUSE ME. YOU'VE GOT THAT UNDER "ANTICIPATION." WE
14 SHOULD HAVE A DIFFERENT HEADING THERE. THAT'S THE OBVIOUSNESS
15 QUESTION AS TO '202, AND THERE'S JUST ONE QUESTION AS TO '202
16 AND '195 ON THE OBVIOUSNESS.

17 AND IT'S WHETHER, GIVEN THE INSTRUCTIONS THAT YOU HAVE
18 BEEN GIVEN, ANY -- THE CLAIM IS INVALID BECAUSE ANY PROCESS
19 WOULD HAVE BEEN OBVIOUS. AND, AGAIN, THOSE CLAIMS THAT ARE
20 PERTINENT TO THAT BASES FOR INVALIDITY ALLEGED BY DU PONT ARE
21 ENUMERATED.

22 AND THE SAME QUESTION IS THEN ASKED WITH RESPECT TO THE
23 '195 PATENT, WHERE ONLY THE ISSUE OF OBVIOUSNESS IS BEFORE YOU.
24 AND THE CLAIMS OF THAT PATENT ARE ALSO ENUMERATED WITH A PLACE
25 FOR YES OR NO AND THEN, OF COURSE, PLACES FOR THE SIGNATURES OF

1 THE JURY.

2 YOU WILL GET A COPY OF ALL OF THE INSTRUCTIONS I'VE
3 GIVEN YOU, INCLUDING THE CONCLUDING INSTRUCTIONS, AND, OF
4 COURSE, THE JURY FORM WHEN YOU GO BACK TO DELIBERATE.

5 WE'RE GOING TO TAKE A SHORT RECESS NOW AND START WITH
6 OPENING STATEMENTS (SIC) WHICH I CAN GUARANTEE YOU WILL KEEP YOU
7 AWAKE AND MORE INTERESTED THAN THE INSTRUCTIONS HAVE.

8 OKAY. TAKE ABOUT TEN MINUTES?

9 (JURY EXCUSED)

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25 (RECESS TAKEN AT 10:14 A.M.)